IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

VALDOSTA DIVISION

FLOWERS BAKERIES BRANDS, LLC, PLAINTIFF : Case No. 7:13-CV-138
VS : February 11, 2015
EARTHGRAINS BAKING COMPANIES INC., ET AL DEFENDANTS. : Macon, Georgia

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TELEPHONE CONFERENCE

BEFORE THE HONORABLE HUGH LAWSON
UNITED STATES DISTRICT JUDGE, PRESIDING

APPEARANCES:

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P R O C E E D I N G S

February 11, 2015

COURTROOM DEPUTY: Mr. Lilly?

MR. LILLY: Yes, ma'am.

COURTROOM DEPUTY: Mr. Brewster?

MR. BREWSTER: Yes, ma'am.

COURTROOM DEPUTY: Mr. Michael?

MR. MICHAEL: Hello, yes.

COURTROOM DEPUTY: And Mr. Strickland?

MR. STRICKLAND: Yes, ma'am.

COURTROOM DEPUTY: Judge Lawson is with us now.

THE COURT: Good morning.

ATTORNEYS COLLECTIVELY: Good morning, Your Honor.

THE COURT: I believe this call was instigated by the Plaintiffs.

MR. BREWSTER: Yes, sir.

THE COURT: Is that you Mr. Brewster?

MR. BREWSTER: Yes, Your Honor, it is.

THE COURT: Go ahead.

MR. BREWSTER: We sent that letter to you a couple of weeks ago responding, at least in part, to you admonition to us late in November to bring matters to your attention and to do so promptly. After we had that

hearing with you in November we finally got the documents from Defendants. There were some glitches in their production. We had to go back to them because they had missed about 600 documents that were still redacted. But when that finally happened we all put our hands down and we were taking a series of depositions. And it got to be their 30(b)(6) deposition and as I have said to some folks here, we finally looked up and realized that what we saw was not the light at the end of the tunnel but, in fact, a train coming the other way.

In that deposition we learned that the Defendants were changing their packaging to a packaging that was not yet decided, that had not been produced, that they were going to ramp up their advertising to double what they had done previously and we have not -- and no advertising in any draft or form has been produced, and that they were going to roll out their Nature's Harvest product nationally; including into what is our core territory in the South and mid-South over to Texas. That they were going to do that in April of 2015, which would occur not only after the close of fact discovery but after we had done the expert work that would go into the case including, for example, surveys regarding their packaging.

It became apparent to us that that was going to

have a dramatic impact on the case. In no small part because the Eleventh Circuit has laid out seven factors that aren't exclusive but that the Court should consider. And they include, at lease, four that will be dramatically impacted by this development.

The first is the strength of the mark. It is conceded that our mark is stronger in the Southeast and where it's been sold for over 35 years as opposed to the areas in California and the Northeast where the parties are overlapped but Flowers has only been for a couple of years. The similarity of the marks gets assessed in the context of packaging and obviously they will have revised packaging.

Similarly the advertising is a factor and the advertising will be different.

And last but not least, by coming into our territory and doing so, given the timing, we anticipate that there will be a dramatic increase in the actual confusion that occurs between the party's products. That it will go from dozens that have been identified to hundreds.

We know it also will have a significant impact on the expert work. I would not expect, for example, the Defendant would concede that our work that we've done on their prior packaging is binding on their new

packaging.

And so a tremendous amount of work would have been done that would not get taken into account in discovery and we would be hurdling toward a trial where the package was different, the advertising was different, and there was rampant actual confusion.

We knew it was not a good idea just to wait for all that to happen and then raise our hands. We considered a number of options. One was to do nothing now.

We could file a new lawsuit in April when they launched on the new packaging and the national expansion. We knew that that created some risks of being disruptive. The Court would have been surprised. It would be very disruptive of the schedules that were under way at the time. And the parties would have wasted a lot of resources between now and then heading in a different direction.

We could have talked about seeking some expedited relief and filing motions to try to intervene in the expansion into our more historic core territories. That also would be disruptive in terms of the extraordinary work in a short term. And we realized that if, you know, the option is having a trial later this year or hearing motions in the spring that that again has some

benefits to sort of rolling this altogether.

That led us to the conclusion, Your Honor, on our part that the smarter course, in terms of efficiency, was to allow fact discovery to conclude on the historic packaging and what they've been doing to date. And then to essentially have a short period of hiatus and once they launch in April to have a brief period of discovery that would be just about the new package, the new advertising and whatever had resulted new in terms of actual confusion or other events from what transpired. That is a short delay but we thought much less disruptive.

It's a period that could be as short as 60 days if the Defendants actually produced their documents. Thirty days after we serve discovery instead of prolonging the period and producing them much later. If they were going to have difficulties with that maybe it would be 75 or 90 days.

But we would anticipate discovery really centered around these new issues, the new package, the new advertising, new actual confusion and the like. That would then be followed by expert reports that could take all of these facts into consideration.

We raised this issue with the Defendants over the course of a few days and ultimately their position is that nothing should occur. They say so for two

reasons.

The first is that we should have known this long ago. I can assure the Court we did not know. We certainly didn't know with any degree of certainty. Part of the reason that we would not have known is that a lot of the documents were redacted including the ones they point to. So in not producing those documents until the middle of December I think there was a hazard that we wouldn't know it until the middle of January.

But, in addition, we have gone back and looked at every document in hindsight that might have possibly told us that this was going to occur. And while there are a handful of documents that talk about a potential launch in the spring of 2015, there are even more documents that talk about the fall of 2015 or the spring of 2016 or some other dates in the future. And obviously we weren't sure until they set those dates. The timing was not confirmed until that deposition and then we proceeded to sort of put these chain of events that has led us to the call today.

The Defendants also note that the parties have done a good bit of work so far. They are correct about that but there has been nothing unusual about that. It's been essentially the work that's been done on their packaging and their advertising and their activities to

date. But none of that, because they haven't produced the new packaging and they haven't produced the new advertising, and none of that could have been directed towards this new subject matter.

Their letter to the Court doesn't raise any other issues other than we should have known and a lot's been done.

The reality is two months from now there are going to be some substantial events that would dramatically change the nature and scope of the case. They've got no response to a proposal to deal with that. We know it needs to be dealt with. We don't want to just put it off and then ask the Court two months from now to be dealing with it on what then would be an urgent and disruptive basis to the rest of the case.

So we think it makes a lot of sense to follow the course that we suggested in the letter and that we've urged and that the alternative is going to create a lot of disruption for us but particularly the Court.

Ultimately getting to the bottom of the confusion is in the public interest. If they launch in our territory and wide spread confusion occurs we ought to be entitled to get it in. And it's in everybody's interest to get that right.

So we think this is a wise course to take and

that simply doing nothing now would really be an inadvisable course to take.

THE COURT: Thank you. Mr. Michaels and Mr. Strickland?

MR. MICHAEL: Yes, Your Honor. This is Howard Michael on behalf of the Defendants from the Brinks Gilson firm.

I wanted to make a couple of points in response. Initially we don't think this request is timely. As we indicated in our letter to the Court, Defendants produced documents concerning its plan for 2015 and beyond at least as early as August of 2014. So that is roughly a half a year ago. We've gone back and confirmed that these documents were not redacted. This material was made available to the Plaintiff, again at least as early as August of last year.

Once more, Your Honor, the Plaintiff had an opportunity to take deposition testimony from at least two of the Defendants vendors concerning its 2015 plans in December. So even if you discount the document production from summer of last year the Plaintiff waited at lease two months after taking that deposition testimony before it raised this issue with the Court's attention.

As the Court is aware discovery in this case has been ongoing now for more than a year. It has been

extended no fewer than three times and we're pushing now almost 14 months of discovery in this case.

The basis for Plaintiff's request is twofold as counsel indicated. One is this idea of a national launch purportedly to occur sometime in the spring of this year. And the second is a possible refresh to the Defendant's product packaging and I just wanted to briefly address each of those issues in turn.

First, with respect to this idea of a national launch. You know, that term is taken a little bit out of context, Your Honor. The national launch language is more of a marketing phrase than it is a strategic businesslike phrase. And, in fact, as we indicated in our letter, Your Honor, since the product, the Nature's Harvest product, was expanded into Southern California in February of 2013, Defendants have continued to roll out the product across the country on an ongoing basis.

And I can give you some dates for some of the regions just to put this into some context. The product was expanded into the specific region in February of 2013 into the Intermountain region in February of 2013, the Midwest in April of 2013, the Metro Atlantic region and the Northeast region which would include major markets such as New York City, Baltimore, Philadelphia, Pittsburgh in July and September of 2013.

So in all of these regions this expansion has been ongoing for, you know, two years, a year and a half, and most of the major markets in these regions the Plaintiff's product, Nature's Own, and the Defendant's product, Nature's Harvest have been competing against one another in major markets. So, for example, the products are competing currently in Baltimore, in Denver, in Kansas City, and Las Vegas, Los Angeles, Philadelphia, San Diego, San Francisco, St. Louis, Wichita. So in all of these areas the products have been competing against one another. And if there was discovery to be taken concerning actual confusion, the Plaintiff had ample opportunity to take that discovery and there's nothing unique about any additional region which would change that calculus.

Secondly, Your Honor, with respect to the product packaging. The Plaintiff, just the end of last week, took the deposition of one of Defendants vendors, a Valentine Design. And specifically the witness in that deposition was Kevin McMahon who is the vice president of Valentine Design. Valentine Design is the key vendor that is involved in this potential product packaging refresh that the Defendants are considering. During his deposition Mr. McMahon testified that as of last week, and to my knowledge nothing has changed since then, the

Defendants are considering a multitude of different product variations as part of this product refresh, including not changing their product packaging at all.

So no decision has been made on a specific package that may or may not be used going forward. It's still under consideration and again there's even a possibility that no product package change would ultimately occur.

Now, based on that the way we read the Plaintiff's request is it's looking for a stay in this case pending the introduction of this possible new product packaging. We can't even assess a potential timeframe when that packaging may hit the market. Indeed the potential stay is indefinite in length.

Again, the parties now have been in discovery for just about fourteen months. The Plaintiff has had ample opportunity to take discovery on every issue in this case that it sought to take discovery on. It's time now for the parties to put their cards on the table and see what we have.

THE COURT: What is it that is anticipated will occur in April, Mr. Brewster?

MR. BREWSTER: Your Honor, according to what their 30(b)(6) witness told us in April their product launch would go from being in a couple different regions

in the US to being national, which means both across the US but it also means that it would go from areas where either of the parties has only been for a year or two to them coming into the South where we've been for 35 years. The notion that there's nothing unique about or different about this region it simply is not true. It is dramatically different and it will dramatically change the nature of the case. So in addition to that geographic extension --

THE COURT: Why is that?

MR. BREWSTER: So, Your Honor, the Eleventh Circuit factors, the very first one they say is frequently the most important is the strength of the mark. You've got a number of the cases from the Eleventh Circuit saying that that could be a determinative factor.

Here there is no question that in markets across the South where Nature's Own has been sold for 35 years that the recognition of it, unaided and aided recognition, recall from consumers is substantially higher by orders of magnitude than it would be in a market -- we'll pick like Baltimore where we've been for less than a year.

THE COURT: Well listen, that's always been true has it not?

MR. BREWSTER: It's been true that it is

stronger here and it's been true that they are not present here.

THE COURT: Well, how is that going to change the progress of the case?

MR. BREWSTER: Well, Your Honor, we would expect the biggest thing that we would expect from outside of the parties is the notion that you're going to have consumers and by that I mean people at the store level and at the public level who are going to have actual confusion. They're going to pick up the wrong package. They're going to call us and say they got the wrong package. They're going to call us and say it's out of stock.

And we expect that that will happen significantly and that those are witnesses that we would want to include in this case and that it makes a lot more sense for us to include them without the disruption of showing up in April and saying we've got a whole bunch of witnesses that we're going to identify and we've got dozens and dozens and dozens of new witnesses and the Defendant is going to say those witnesses should have been identified before and we are going to say, no, they couldn't be identified. And somebody is going to say, well, we'd like to have some discovery about those if you're going to add them.

So we're going to be adding actual confusion witnesses and instead of taking that up in April and having a discussion about how to structure that, we thought it made sense to structure it now. The comment at the end that --

THE COURT: These witnesses to whom you refer these are potential customers who you believe will be confused?

MR. BREWSTER: Yes, Your Honor. So far in the case, you know, across different situations we'll get a call from a grocery store that will say, "Hey, come fill up your product", and we show up and what's missing is Nature's Harvest and not Nature's Own.

Or a consumer will call us and say that they see that we have changed our formula when, in fact, they're calling us about Nature's Harvest.

What is going to happen, and not that I have a crystal ball, but based on the substantial strength of the market in this region I know that in April or May in that timeframe we're going to be coming to the Court and saying we've got overwhelming evidence of actual confusion. We want those witnesses to be available to participate in the trial. And that's going to be something that is going to -- there will be an awful lot of gnashing of teeth. Can we call those witnesses? And the Defendants are going to

say, "That's fine, they can call those witnesses. We've known all along there was actual confusion. We're not worried about deposing them." I'm not sure if that's going to happen.

At the same time, Your Honor, the survey work that would be done to demonstrate confusion you're supposed to do in a universe which is where the product is sold. So far you would have been talking to people who were not in the southeast because that's not where they would have encountered the product. And now you would be doing work with a completely different universe with people who, our documents and their documents say, that more than half the people if you ask them in the South name a bread more than half say Nature's Own.

THE COURT: Well, listen --

MR. BREWSTER: In other parts of the country it's a lot lower.

THE COURT: Taking what you say at face value, why aren't we faced with a situation where you would be making the same argument and asking for the same delay every time they might go into a new market?

MR. BREWSTER: Well, Your Honor, here we've got the one situation which is they're going from, what I'll call a bunch of fringe markets and they're going to our core market. And they'll go -- it will be a national

launch so there won't be any new markets.

| You are correct that if this was an incremental thing we might be facing this issue at different points in time. But this is kind of a one time event where they are going national. They didn't launch that way to begin with or we wouldn't have had this issue.

So this is a -- you are right that in other situations it maybe could happen incrementally and continuously. Here it would be a one time dramatic change.

THE COURT: Mr. Michael?

MR. MICHAEL: Your Honor --

THE COURT: Mr. Michael. Question?

MR. MICHAEL: Yes, sir.

THE COURT: Are you all going to make this move in April?

MR. MICHAEL: What's going to happen in April, Your Honor --

THE COURT: Answer my question. Yes or no?

MR. MICHAEL: There will be a continuation of the national rollout in April as has been occurring for the last two years.

THE COURT: Are you moving into the Southeast in April?

MR. MICHAEL: The intent is that there will be

some movement into the Southeast in April. But again there's already a product available in the areas of the South in April.

THE COURT: Where?

MR. MICHAEL: For example in Oklahoma and Texas.

THE COURT: That is not the --

MR. MICHAEL: And areas of Virginia.

THE COURT: That's that other Southeast.

MR. MICHAEL: The point, Your Honor, is that there has been a continual rollout of this product for the last two years.

And, Your Honor, your point is well taken. If we accept the Plaintiffs rationale at face value then, in cases like this, business activities of both litigants would essentially have to remain static. There can be no change in markets. There can be no tweaks to product packaging because every time there were, there would be a basis to either continue discovery or to reopen discovery.

The same rationale could be made if Defendants were to move into a different market other than the Southeast. Again there's already been ample opportunity in this case where the products have been competing against one another in the same market. A market like

New York City or Denver or San Francisco those are not fringe markets. Those are major markets where the Plaintiff had an opportunity to go in and take discovery concerning evidence of actual confusion if it existed.

THE COURT: Okay. I'm going to put you all on hold.

(BRIEF RECESS)

THE COURT: Gentlemen, are you still there?

MR. BREWSTER: We are, Your Honor.

MR. MICHAEL: Yes, sir.

MR. STRICKLAND: Yes, sir.

THE COURT: Here's what I'm going to do. I am going to extend discovery to July 1, 2015. I'm going to extend the expert phase of it to October 1, 2015.

Whatever you intend to do by way of discovery and experts has got to be completed within that time. I'm not going to grant any more extensions. You know, you can go out back and fall on your sword for all I care. There ain't going to be any more extension granted.

I will expect both parties to be cooperative and forthcoming where discovery is concerned. If there are any problems about that I expect you to pick up the phone and call me immediately. If I determine that either party

is not being forthcoming, is not being cooperative in a way that I think it ought to be done, then there are going to be sanctions levied.

Do any of you have any questions?

MR. BREWSTER: No, Your Honor, thank you.

THE COURT: Mr. Brewster, do you?

MR. LILLY: No, Your Honor. That was Mr. Brewster, thank you.

THE COURT: Mr. Michael?

MR. MICHAEL: No, sir. No questions. Thank you.

THE COURT: Anything else we need to discuss?

MR. STRICKLAND: Your Honor, should we submit a proposed order that fits what the Court just decided?

THE COURT: Yes, that will be fine.

MR. STRICKLAND: Because we've got different schedule dates and --

THE COURT: This is Jerome Strickland, is it not?

MR. STRICKLAND: Yes, Your Honor.

THE COURT: Yes, Mr. Strickland, go ahead and submit one but go on and do it promptly.

MR. STRICKLAND: Will do.

THE COURT: Anything else?

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: Good to talk to you.

(The telephone conference was concluded)

CERTIFICATE OF OFFICIAL REPORTER

I, Tammy W. Fletcher, Federal Official Court Reporter, in and for the United States District Court for the Middle District of Georgia, do hereby certify that the foregoing is a true and correct transcript of the reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of August, 2015.

Tammy W. Fletcher

TAMMY W. FLETCHER, CCR
FEDERAL OFFICIAL COURT REPORTER